The entities currently subject to the higher 10 percent threshold were deemed "passive" investors because such companies "invest for income only, are so bound by fiduciary responsibility, and are either prohibited by law or simply not in the practice of taking control or influencing the programming decisions of the companies in which they invest." 97 FCC 2d at 1012. In addition, the Commission recognized that such investors provide important, alternative sources of funding, and "'expand the availability of capital to the broadcast and cable industries without significant risk of attribution errors.'" Notice, ¶ 47 (quoting 97 FCC 2d at 1012-1013).

Public pension funds like CalPERS satisfy all of these same elements. CalPERS is under a statutory duty to minimize risk and maximize returns. See Cal. Gov. Code § 20205.8.[13/] CalPERS' administrators, officers, and employees are fiduciaries of the Public Employees' Retirement Fund, and owe a duty of loyalty to discharge their responsibilities with respect to the Fund "solely in the interest of the participants and beneficiaries." Id. As a public pension fund, CalPERS must carefully manage its staff resources, and it does not become involved in programming or other day-to-day decisions of its media investments, nearly all of which are held

12/(...continued)
across-the-board increase in the potential capital available to broadcast entities, Notice at n.97, pension funds like CalPERS would certainly be encouraged to invest in broadcast entities under a higher threshold.

13/ Through the exercise of this duty of care, CalPERS' administration must seek to maximize investment returns so that: "(1) defined benefits can be paid when they become due; (2) reasonable administrative expenses can be defrayed; (3) employer contributions can be minimized; and (4) a surplus is achieved to maintain retirees' purchasing power through increased monthly allowances." Cal. Gov. Code § 20205.8(a); Cal. Const. Art. XVI, § 17.

indirectly through limited partnership investment funds. As a limited partner, CalPERS is precluded from an active role in these Alternative Investments.

The Commission originally declined to include pension funds in its "passive" category based upon its perception at the time that "pension funds were increasingly managing their own investments and actively pursuing social goals in their investment policies" and that, as a class of investments, pension funds were "not so consistently passive in nature as to warrant relaxed benchmark treatment..." Notice, ¶ 51; 97 FCC 2d at 1014-16 & n.44. This perception is contrary to CalPERS' own experience. CalPERS' primary goal with respect to all its investments, consistent with its fiduciary duty of care to its members, is to maximize their return. CalPERS' does not manage its own investments, but rather relies on the management of the general partners of its investment funds and the managers or controlling shareholders of companies in which it is directly invested. Distinct from its Alternative Investment program, CalPERS has allocated some 32% of its assets to equity holdings in an indexed portfolio for domestic stock.[14/] By definition, an index is passively managed.[15/]

14/ CalPERS uses a customized version of the Wilshire 2500 Index.

15/ The only variation from this practice at present is the CalPERS' "corporate governance" program, in which CalPERS has chosen to meet with the Boards of certain selected companies in which CalPERS has a substantial investment that it believes is in financial jeopardy, in an effort to improve the company's performance. However, this type of activity occurs in an extremely small percentage of CalPERS' direct investments (approximately 10 of 2,500 companies) and has not included any media investments. In the unlikely event that a direct investment in a media company were included in such a program in the future, the current and proposed additional certification requirements would effectively preclude application of the higher benchmark for such investments.

Some additional background on CalPERS' current media investments may be helpful to the Commission's understanding of pension funds' involvement in broadcast entity financing. Like those entities currently subject to a higher equity threshold, CalPERS is an alternative source of funding for media companies -- including companies that have traditionally had difficulty gaining access to capital, such as minority- and women-owned media companies.[16/] As a subset of its Alternative Investment program, CalPERS also invests in "Alternative Emerging Investment Opportunities" ("AEIO"). This subset was established in 1992 to permit CalPERS to target non-traditional investment opportunities, specifically including minority- and women-owned businesses. Under the AEIO, CalPERS has invested in a minority-owned fund, which in turn invests in Hispanic-operated radio stations. CalPERS intends to continue to seek such opportunities, but may be limited in certain circumstances if attribution of its interests would result in a multiple ownership conflict.

If the Commission remains concerned that pension funds may become actively involved in their media investments, the Commission could require that members of any broadened class of entities subject to a higher threshold certify that they have no material involvement in media-related activities. This certification would be similar to the current requirement that licensees certify that no party in a "passive investor" category has in fact exerted or attempted to exert any influence or control over any of the licensee's affairs. See 97 FCC 2d at 1014. In the event an institutional investor otherwise included in the expanded class desired to become

16/ Again, this would be in the Alternative Investment arena -- distinct from the indexed portfolio which is the subject of CalPERS' corporate governance activities.

actively involved in the media-related activities of one of its investments, the investor would not be able to make the required certification and would be subject to the lower attribution level.

The Commission has already expanded the class of "passive" institutional investors in other contexts. In its recent PCS rulemaking proceedings, the Commission recognized that a broadening of the "institutional investor" class to include venture capital firms and other investment companies will help provide additional sources of funding for designated entities, and will "improve investment incentives without undercutting those rules' primary goal of serving as anticompetitive safeguards." Amendment of the Commission's Rules to Establish New Personal Communications Services in the 2ghz Band; Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, 77 Rad. Reg. 2d 362, ¶ 10 (1995). A broadening of the class of investors subject to a higher threshold in the broadcast rules to include pension funds and other similarly situated institutional investors would likewise not interfere with the purposes of the multiple ownership rules here. Pension funds generally have characteristics similar to those of other "passive" investors, and pension funds would provide an important additional source of financing -- one which is particularly important to minority- and women-owned businesses.

V. THE COMMISSION SHOULD ELIMINATE THE CROSS-INTEREST POLICY AS APPLIED TO NON-ATTRIBUTABLE EQUITY INTERESTS.

As the Commission's Notice observes, the majority of commenters in the prior proceedings addressing the cross-interest policy issues have urged elimination of the policy as applied to non-attributable equity interests. See Notice, ¶ 83. CalPERS supports this position for many of the same reasons.

In CalPERS' experience, the ad hoc nature of the cross-interest policy results in significant uncertainty regarding what interests are permitted. This imposes administrative burdens on investors and impedes the ability of broadcasters to attract equity investment capital through the use of non-attributable equity interests because the policy can be invoked to prohibit a seemingly permissible transaction. See Cross-Interest Policy Statement, 4 FCC Rcd 2208 (1989) (discussing comments of Morgan Stanley & Co., Inc.). While CalPERS cannot cite specific evidence to demonstrate this problem (Notice ¶ 90), it agrees with other comments that the potential for case-by-case review and enforcement of the policy has these unintended consequences.

Given these adverse effects of the cross-interest policy, and the fact that the Commission's ownership and attribution rules have to a large extent superseded cross-interest regulation with respect to the relationships that most significantly affect competition and diversity,[17] the Commission should conclude that continued regulation of non-attributable equity interests through the policy is unwarranted. This is particularly appropriate and necessary in the case of large institutional investors such as public pension funds, which may from time to time acquire various indirect,

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17/ See Notice ¶ 80; Cross-Interest Policy Statement, 4 FCC Rcd 2208 (1989).

non-attributable interests in broadcast licensees or cable systems through limited partnership investment funds or other alternative equity financing.

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